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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 277

IN THE MATTER OF
JOHN W. CARTER

Memorandum in Opposition to Granting a Writ of Certiorari

COBB, HOWARD AND HAYES
Attorneys at Law
615 F Street, N.W.

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I. JURISDICTIONAL OBJECTION.

A primary and substantial objection to the Petition for a Writ of Certiorari is that in spite of the manner in which the petition is captioned, that is,

> BOLITHA J. LAWS, CHIEF JUDGE, AND F. DICKINSON LETTS, JAMES W. MORRIS, DAVID A. PINE, MATTHEW F. McGUIRE, HENRY A. SCHWEINHAUT, ALEXANDER HOLTZOFF, RICHARD B. KEECH, EDWARD M. CURRAN, EDWARD A. TAMM, BURNITA SHELTON MATTHEWS, CHARLES F. McLAUGHLIN, JAMES R. KIRKLAND, and WALTER M. BASTIAN, DISTRICT JUDGES, COMPRISING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Petitioners,*
>
> v.
>
> JOHN W. CARTER

and in spite of the fact that the Petition purports to be by the Solicitor General of the United States on behalf of the

United States District Court for the District of Columbia and the Judges thereof, neither the said Judges nor the Solicitor General on their behalf or on behalf of the United States District Court for the District of Columbia has any standing to file such a Petition nor, it is respectfully submitted, does this Court have jurisdiction to entertain such a Petition. The alleged petitioners invoke the jurisdiction of this Court under the provisions of 28 U. S. Code, Section 1254, Subsection one (1). We quote the language of the Subsection:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> "(1) By writ of certiorari granted upon the petition *of any party* to any civil or criminal case, before or after rendition of judgment or decree" (italics ours).

This language it is to be noted expressly provides that the Petition must be filed by a party to the litigation. In the instant case the only standing that the Solicitor General had was as amicus curiae. What is even more important in view of the step here attempted to be taken is that the Court of Appeals as is outlined in the "Statement" filed by the Solicitor General as of, to wit, June 8, 1950, denied a motion filed on behalf of the District Court and its Judges seeking to be made parties, for leave to intervene, for hearing and for leave to present oral argument and file a written brief. Thereafter and upon application of the Solicitor General, as amicus curiae, to participate in the cause and to file a written brief, in the capacity designated the Solicitor General filed such a brief urging all the points now sought to be brought to this Court's attention, asking for the dismissal of the appeal and setting forth, with the citation of authorities, identical with those here relied upon, each and all of the points set forth in the present petition. The right also of oral argument was granted the Solicitor General and a full hearing was accorded him, including an extention of time beyond the period originally set for

the oral arguments in the case. In other words, except for the fact that the Court of Appeals, properly we submit, confined the nature of his appearance to that of amicus curiae, the Solicitor General put before the Court and argued, as fully as if he had actually represented a party to the cause, every conceivable pertinent point in opposition to the position assumed by the respondent and eventually decided by the Court of Appeals, first with three Judges sitting and then assembled in banc upon petition of the Solicitor General. This privilege of appearing solely in the capacity of amicus curiae was fully taken advantage of by the Solicitor General; and now that the Court of Appeals, with all his arguments before it, has decided the case against his contentions, he now puts himself in the anomalous position of seeking certiorari as amicus curiae or purporting to act on behalf of the parties to the litigation who had been expressly so excluded by ruling of the Court of Appeals.

It is to be noted that in spite of the fact as hereinbefore set forth, that the Court of Appeals denied the application of the Solicitor General to appear on behalf of the United States District Court for the District of Columbia and the Judges thereof, that both in addressing petitions or applications to this Court and in filing motions with the Court of Appeals, the Solicitor General has seen fit to represent himself as acting "on behalf of the United States District Court for the District of Columbia and the Judges thereof". The correctness of this assertion will be evidenced by reference had to "Application for an Extension of time within which to File a Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia" filed in this Court in June, 1951, in which the Solicitor General applied for an extension of time to file a Petition for a Writ of Certiorari in the cause from June, 1951, to and including August 27, 1951, and which application made by him he alleged to be "on behalf of the United States District Court for the District of Columbia and the Judge thereof". It is

to be noted in this regard that the Order granting the Extention of time for the filing of the Petition for the Writ of Certiorari to and including August 27, 1951, signed by Chief Justice Fred M. Vinson of this Court and captioned "IN THE MATTER OF JOHN W. CARTER" begins with this language:

> "UPON CONSIDERATION of the application of counsel for petitioner,
>
> IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 27, 1951."

It is to be remembered in this regard as hereinbefore outlined that the Solicitor General who made the application was not counsel for any party to the litigation, but participated solely as amicus curiae. Further in keeping with the suggestion above mentioned as to the procedural steps of the Solicitor General, the record will disclose that as of, to wit, August 2, 1951, and after the time that the Court of Appeals had specifically refused the Solicitor General the right to appear on behalf of the United States District Court for the District of Columbia and the Judges thereof, the Solicitor General nonetheless made a "Motion to Authorize Clerk to Transmit Original Transcript of Record to the Supreme Court of the United States", and begins said motion with the language:

> "Now come the United States District Court for the District of Columbia, and the Judges thereof, in the above-entitled cause and move that this Court authorize the Clerk to transmit the original transcript of record in this cause to the Supreme Court of the United States for use in connection with petition for writ of certiorari."

And then again with what may have some significance, as of the same date, August 2, 1951, filed a Designation of Record capitioned "In Re: In the Matter of John W. Car-

ter" directing the Clerk of the Court of Appeals for the District of Columbia to prepare a transcript of record for use on petition to this Court for Writ of Certiorari, which said designation is simply signed "Philip B. Perlman, Solicitor General" without indication as to the capacity in which he there appeared or on whose behalf. The Court of Appeals in granting the Motion for transmitting the original transcript of record to this court uses the following significant language:

"No. 10,504 April Term, 1951

In the Matter of:

John W. Carter

Before: Edgerton, Miller and Fahy, Circuit Judges.

Order

On consideration of the motion filed herein on behalf of the United States District Court for the District of Columbia and the Judges thereof to authorize the Clerk to transmit the original transcript of record herein to the Supreme Court for use in connection with a petition for a writ of certiorari, *and it appearing that the said United States District Court and the Judges thereof are not parties in this case, and treating said motion as a motion of the Solicitor General,* it is

ORDERED by the Court that the motion be, and it is hereby, granted.

Dated: August 27, 1951.

Per Curiam."

(Italics ours.)

This Order, it is to be noted, includes the date August 27, 1951, and was, as is by so much evidence, signed in the cause after the time that the record had been designated, which was on, to wit, August 25, 1951. This appears to us as proof to a demonstration that the Solicitor General is without standing in this Court as appearing in a repre-

sentative capacity for any "party" to the cause, and, as before emphasized by us and as here indicated by the Court of Appeals, is without authority to file a petition for a writ of certiorari in this cause, he having no capacity other than that of being the Solicitor General which is without significance in this cause where the Government is not involved.

With this express ruling by the Court of Appeals denying the Solicitor General the right to appear on behalf of the United States District Court for the District of Columbia and the Judges thereof, and it being remembered that the same position was taken by the Solicitor General in the case of In Re: John W. Carter, 338 U.S. 900, in which cause this Court denied certiorari with exactly the same arguments being advanced. It is not to be supposed that the Solicitor General has the arbitrary right to nonetheless make the United States District Court for the District of Columbia and the Judges thereof parties to this litigation.

We respectfully submit that were this Court to recognize and grant a petition for certiorari filed by an amicus curiae, or were this Court to allow a person or persons to be petitioners for certiorari, not parties to the cause, and expressly extend some participation therein, such unprecedented action would result in an avalanche of petitions and a host of petitioners to such extent as would substantially cripple the functioning of this Court, which the rule on amicus participation was designed to prevent. And it is respectfully submitted that the recognition of such person or persons and the granting to them of relief sought could not be justified by a recital of the fact that the Solicitor General was the applicant and that the application was made allegedly on behalf of the Judges of the United States District Court for the District of Columbia. No position in the American form of government could or would be so

sacrosanct as to justify such a fundamental change in procedure.

It is respectfully submitted that the Court is without jurisdiction to entertain this petition for certiorari and that the same should be denied.

II. GROUNDS DO NOT EXIST FOR GRANTING CERTIORARI.

A. Without in any manner waiving the point hereinbefore made, there are numerous reasons why, even if the party seeking relief were a proper party, which is in nowise conceded, there is no such showing as would justify this Court in granting certiorari. This case splendidly exemplifies the old adage of a tempest in a teapot. A perusal of the record will reveal that the case presents nothing other than an issue of local law affecting only this respondent, John W. Carter, nor are there any unusual factors or questions which this Court should be called upon to pass upon, the suggestion of the Solicitor General to the contrary notwithstanding. That this Court is ordinarily reluctant to take cases on issues of local law the Solicitor General concedes, but, we submit, entirely fails to show the alleged "unusual character of the present controversy" or, the nature of the questions involved to be such as to justify the granting of certiorari. That the case presents only issues of local law and the finality under such circumstances of opinion of the United States Court of Appeals for the District of Columbia is exemplified by comparison of the instant case with the case of *Del Vecchio* v. *Bowers,* 296 U.S. 280, 80 L. Ed. 229.

In that case the Court of Appeals for the District of Columbia had construed the Longshoremen's and Harbor Workers' Compensation Act with respect to claim for compensation arising in the District of Columbia. This Court,

in passing on the question of whether the case fell within Rule 38 of this Court's rules, used this language:

> "We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application."

The position of the Solicitor General on this question, of the issue being an exception to the rule regarding local law, is unsupported by the authorities and a reference to the cases cited by him will show same as not being in point or as plainly distinguishable (see petition, page 10, note 5). The case of *Aldrige* v. *United States,* 283 U.S. 308, involved a Negro petitioner who was convicted of murder in the District Court for the District of Columbia. This Court granted certiorari on the question of the refusal of the District Judge to inquire about the attitudes of racial prejudice of prospective jurors on their voir dire. Clearly this was a question of great constitutional significance that transcended the local limitation of the District of Columbia and did, in fact, call to the attention of the Court a question of great substance involving the protection of constitutional rights of citizens of the United States in much the same sense as those present in the recent case of *Hurd* v. *Hodges,* 334 U.S. 24, 92 L. Ed. 1187. In *Reed* v. *Allen,* 286 U.S. 191, which was an action in ejectment brought under the District of Columbia Code on what at first blush appeared to be a purely local matter. However, an examination of the facts in the case makes it quite clear that this Court granted certiorari because of the apparent disregard by the Court of Appeals for the District of Columbia of the salutary Doctrine of res judicata. This Court stated in that case:

> "And the mischief which would follow the establishment of a precedent for so disregarding this salutary

> doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

It is quite apparent that the concern of this Court was not for proper construction of the D. C. Code, but was rather directed toward the respect for finality of a judicial determination.

Similarly the problem in *Best* v. *The District of Columbia*, 291 U.S. 411, involved a question of real significance. In an action for death of a child caused by defendant's negligence, the District Court for the District of Columbia granted defendant's motion for a directed verdict after hearing only the opening statement by plaintiff's counsel and before any evidence was taken. The trial judge refused to take testimony but ruled that the opening statement of counsel clearly showed that plaintiff had no cause of action. When this decision was affirmed by the Court of Appeals for the District of Columbia, this Court properly, we think, granted certiorari on the question of the propriety of such a determination by the District Judge. It seems apparent that that case is to be distinguished from the instant case. A matter as important as the proper conduct of civil actions in the courts of the District of Columbia is of course a significant matter affecting the general public, and where the question raised goes to the heart of proper civil procedure, this Court may well assume the responsibility of correcting procedural errors. *Washington Fidelity National Insurance Company* v. *Burton*, 287 U.S. 97, called into question the proper construction of a section of the insurance law applicable in the District of Columbia. Whitle the majority of this Court held on the merits of the case that the statute involved did not preclude certain defenses of the petitioners, Mr. Justice Stone, with whom Mr. Justice Brandeis joined in a dissenting opinion, pointed out that the case should have been dismissed since: "Certiorari was granted on representation

that the court below had 'decided erroneously a question of general importance' and that the decision 'is in conflict with all decisions in other jurisdictions involving similar statutes and therefore tends to unsettle the law'. It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 61 L. Ed. 557; *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U.S. 508, 68 L. Ed. 413; *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440, 62 L. Ed. 385; *Layne & B. Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L. Ed. 712; *Furness, W. & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U.S. 430, 61 L. Ed. 409."

At no point does the majority opinion meet this issue and no expression of the majority opinion refutes the language above quoted. It is submitted that this case is not authority for the purpose for which it is cited in the petition of the Solicitor General.

Loughran v. *Loughran*, 292 U.S. 216, was an action by a surviving spouse for dower. Her entitlement to dower depended upon the validity of a marriage void in the District of Columbia and valid in the State where it was performed. This Court granted certiorari on the question of whether the District of Columbia must give full faith and credit to an alimony decree rendered in a State and sought to be enforced in the District of Columbia. This so obviously presents a question of conflict of laws which transcends a question of purely local interest, and moreover raises a question of significant constitutional importance either of which will warrant the issuance by this Court of a writ of certiorari.

The two remaining cases cited by the Solicitor General, *District of Columbia* v. *Murphy*, 314 U.S. 411, and *District of Columbia* v. *Pace*, 320 U.S. 698, involve the review of appeals from the District of Columbia Board of Tax Appeals. In the *Pace* case this Court granted certiorari to determine the scope of review by the Court of Appeals of decisions of the Board of Tax Appeals. After construing the statute this Court stated:

> "The question as to which of the inconsistent provisions shall govern arises in a local statute confined in its operation to the District of Columbia. 'We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District.' *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285. Cf. *American Security & T. Co.* v. *District of Columbia*, 224 U.S. 491; *United Surety Co.* v. *American Fruit Product Co.*, 238 U.S. 140."

In this and in the *Murphy* case it is apparent that this Court was quite cognizant of its general rule with respect to non review of purely local matters and only because of the significance of the question of domicile which in the *Murphy* case was related to the non-taxability of persons living in the District employed by the Federal Government but domiciled in a State, was certiorari granted. Clearly that question cannot be said to be local in character nor can the question in the *Pace* case of whether a decedent was domiciled in the District of Columbia or in a State for inheritance tax purposes be considered a question local in character.

B. And again, the points raised by the Solicitor General have been fully explored and rightly decided and consequently certiorari should not be granted. The position of the Solicitor General in this matter is further anomalous in that with the Government not involved, he injects himself or rather his office in an attempted vindication of the

alleged position of the Judges of the United States District Court of the District of Columbia against the reasoned and decided position of the Court of Appeals as determined by the majority of that court sitting in banc. Is it a proper function of the Solicitor General to thus bear cudgels for one Court against another if indeed there be a controversy between the two courts, which we respectfully submit this cause does not amount to? As a matter of fact there is no conflict between the Courts; all that has happened is that the Court of Appeals has fully heard and reversed a decision of the United States District Court. This can no more be considered a conflict or a controversy than if this Court heard a cause and reversed the United States Court of Appeals for the District of Columbia. We repeat that under these circumstances it seems to beggar explanation that the Solicitor General should be championing the cause of the inferior court. In such a local cause as this, the pronouncement of the Court of Appeals is recognized as the final word and as such should be so respected—certainly at least by the Solicitor General of the United States. The Solicitor General nevertheless complains that this cause is "a non-adversary ex-parte procedure unknown to our law". And he urges that the participation granted the Solicitor General as amicus curiae is no proper substitute for participation by persons directly interested in the cause. Even if we advanced on what we conceive of as being the false premise that there is in this case something which calls upon the District Court to vindicate its opinion or position, a reference to the record forces the inquiry—what additionally could the Solicitor General have done were he acting as counsel rather than as amicus curiae? The answer, clarion clear, is that the Solicitor General has presented to the Court of Appeals orally and in writing all of the contentions which there and now he could or can possibly urge.

It is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

COBB, HOWARD AND HAYES
Attorneys at Law
615 F Street, N.W.

By: .....
JAMES A. COBB

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GEORGE E. C. HAYES

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HOWARD JENKINS, JR.